

Chapter XVI
Aircraft Noise *versus* Respect for Home
and Private Life

Diane Ryland

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‘... what do human rights pertaining to the privacy of the home mean if day and night, constantly or intermittently, it reverberates with the roar of aircraft engines?’¹

‘The risks posed by industry may have acquired the ‘environmental’ label but the fact that they are unequally distributed is essentially a political, not a legal, concern; it is no more and no less an affront to human rights than the existence of inequalities in the distribution of income, wealth, health, etc.... Given the importance of the wider struggle for human rights, it is surely unwise to blunt our most respected weapons on the less deserving targets’.²

Is it possible to reconcile these opposing views as to the potential scope of the European Convention on Human Rights as far as environmental noise pollution, in particular health-debilitating levels of nighttime aircraft noise, is concerned? If not, is there any way in which equilibrium may be attained?

Introduction

This paper evaluates international, European, and national law, and seeks a fair balance between the conflicting interests concerning night flights and consequential nighttime aircraft noise. ‘Air travel is essential to the United Kingdom’s economy...In the last 30 years there has been a five-fold increase in air travel. It has opened up opportunities that for many did not exist before; half the population flies at least once a year, and many fly more than that. [The] economy depends on air travel. Many businesses, in both manufacturing and service industries, rely on air travel...Visitors by air are crucial to UK tourism. Airfreight has doubled in the last 10 years; one third by value of all goods export(ed) go by air. 200,000 people are employed in the aviation industry, with three times as many jobs supported by it indirectly.’³ However, ‘[n]oise from aircraft operations at night is widely regarded as the least acceptable aspect of aircraft operations.’⁴ Moreover, ‘[w]hile many pollutants, because of their toxicity or volume, have far more serious long term environmental impact, noise, [...] is the factor most people identify as causing the greatest perceived deterioration in the quality of life.’⁵

It is submitted that the primordial Grand Chamber judgment of the European Court of Human Rights in *Hatton II*, a case which went to appeal concerning an increase in aircraft nighttime noise, represents a step backwards in the protection of privacy and human health in the home provided for in Article 8 of the European Convention on Human Rights. What is the way forward for individual ‘environmen-

tal rights' after the Grand Chamber's judgment? The scope of the International Civil Aviation Organisation, operating under the auspices of the 1944 Chicago Convention, is examined, as are the noise standards, recommendations and guidelines of the World Health Organisation. European Community law, both substantive and procedural, European Community principles, and the Charter of Fundamental Rights of the European Union, will be evaluated. The Human Rights Act 1998 and the principle of proportionality, further, will be examined in context. Of significance, is the development of the common law of nuisance, in the light of the Human Rights Act, and the potential scope for flexibility in the award of damages to individuals whose interests are superseded by those deemed higher up the scale. Pertinent case law of the European Court of Human Rights and of the national courts in the United Kingdom will be critically appraised. It will be submitted that under the principle of proportionality, weight being accorded to the unreasonable burden suffered by a few, and in the light of health factors, the balance should have tilted towards the applicants in *Hatton II*.

The Evolution of 'Environmental Rights' in Europe

There was no mention of 'environmental rights' in the Council of Europe, European Convention on Human Rights and Fundamental Freedoms (ECHR) of 1950, comprised of civil and political rights. 'In the 1950s, the universal need for environmental protection was not yet apparent.'⁶ Environmental values have since evolved in response to societal change and increased public awareness. The turning point was the Stockholm Declaration on the Human Environment of 1972, which associated environmental quality and well being with fundamental rights, and which declares that: '*Man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being...*'⁷

The first successful environmental case heard by the European Court of Human Rights in Strasbourg, in the absence of an explicit right to a clean and healthy environment, concerned a violation of Article 8 ECHR.⁸ Article 8.1 of the Convention provides that *everyone has the right to respect for his private and family life, his home...* In accordance with Article 8.2 of the Convention, *there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of...the economic well being of the country ...or for the protection of the rights and freedoms of others.* The case of *López Ostra v Spain*⁹ concerned emissions of polluting fumes, pestilential and irritant smells and repetitive noise from a waste treatment plant. The Court ruled that, 'Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.'¹⁰ In the light of the particular facts of the case; namely that the plant was operating without the requisite licence, that the family had to bear the nuisance caused by the plant for over three years before moving house, moving only when it appeared that no end to the situation was in sight and because of medical opinion

concerning Mrs *López Ostra's* daughter; the Court considered that there had been a violation of Article 8 ECHR. Having regard to these facts, and despite the margin of appreciation left to the Spanish authorities, the Court ruled that the State did not succeed in striking a fair balance between the interests of the town's economic well-being, - in housing a waste-treatment plant, - and Mrs *López Ostra's* effective enjoyment of her right for her home and her private and family life. This case was followed by that of *Guerra and others v Italy*, judgment of the Grand Chamber, in which the Court ruled that the direct effect of a factory's toxic emissions on the applicants' right to respect for their private and family life meant that Article 8 ECHR was applicable.¹¹ 'In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks that their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.'¹² The Court held, thus, that Italy was in violation of Article 8 of the Convention.

In an earlier application, in the case of *Powell and Rayner v United Kingdom*,¹³ the applicants maintained that, as a result of excessive noise generated by air traffic in and out of Heathrow Airport, they had each been victim of an unjustified interference by the United Kingdom with the right guaranteed to them under Article 8 ECHR.¹⁴ Admittedly, the Court recognised the admissibility of the claim ruling that, 'in each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport.'¹⁵ However, after declaring that a fair balance had to be struck between the competing interests of the individual and of the Community as a whole, the European Court of Human Rights delivered its judgment for the United Kingdom, ruling that the operation of a major international airport pursued a legitimate aim,¹⁶ various measures to control, abate and compensate for aircraft noise had been introduced,¹⁷ and the statutory limitation on liability was not absolute.¹⁸ Furthermore, the government considered specific regulatory measures, as opposed to litigation, a better way to deal with the problems caused by aircraft noise. 'It is certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere. This is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation.'¹⁹ According to the Court, in forming a judgement as to the proper scope of the noise abatement measures for aircraft arriving at and departing from Heathrow Airport, the United Kingdom Government could not arguably be said to have exceeded the margin of appreciation or upset the fair balance required to be struck under Article 8 ECHR.²⁰

The law was confirmed by the European Court of Human Rights sitting as a Grand Chamber, on appeal, in the case of *Hatton and Others v United Kingdom*,²¹ judgment of 8 July 2003, a case concerning increased aircraft night-time noise.

Quantitative steps forward in the protection of individual environmental rights had been made in *López Ostra*, *Guerra*, and, significantly, in the context of an increase in aircraft nighttime noise, in *Hatton I*,²² prior to the appeal. *Hatton I*, thus, extended the reach of Article 8 ECHR to where it had not previously been applied, but this was short-lived.

Hatton I and Hatton II

The background to the *Hatton* case lay in the decision of the Secretary of State for Transport to adopt a revised scheme of nighttime aircraft noise restrictions at Heathrow airport, which introduced a noise quota scheme for the night quota period.²³ Consequent to the reduction in the length of the night quota period, the number of movements permitted during the night period (i.e. from 11 p.m. to 7 a.m.) increased under the 1993 Scheme.²⁴ The Secretary of State's decision to introduce the 1993 Scheme had been challenged by way of judicial review. The High Court had declared that the 1993 Scheme was contrary to the terms of section 78(3)(b) of the 1982 Civil Aviation Act, and therefore invalid, because it did not 'specify the maximum number of occasions on which aircraft of descriptions so specified may be permitted to take off or land' but, instead, imposed controls by reference to levels of exposure to noise energy.²⁵ Consequently, the Secretary of State decided to retain the quota count system, but with the addition of an overall maximum number of aircraft movements. This decision was held by the High Court to be in accordance with section 78(3)(b) of the 1982 Act. However, the 1993 Consultation Paper was held to have been 'materially misleading' in failing to make clear that the implementation of the proposals for Heathrow airport would permit an increase in noise levels over those experienced in 1988.²⁶ In July 1996, subsequent to the publication of additional Consultation papers, and in a further application for judicial review, the Court of Appeal decided that the Secretary of State had given adequate reasons and sufficient justification for his conclusion that it was reasonable, on balance, to run the risk of diminishing to some degree local people's ability to sleep at night because of the countervailing considerations to which he was, in 1993, willing to give greater weight, and that by June 1995 errors in the consultation papers had been corrected and the new policy could not be said to be irrational.²⁷

In their application to the European Court of Human Rights, the applicants, in *Hatton I*, alleged a violation of Article 8 ECHR by virtue of the increase in the level of noise caused at their homes by aircraft using Heathrow airport at night after the introduction of the scheme in 1993. They submitted that, after the 1993 scheme was introduced, the level of noise caused by aircraft taking off and landing at Heathrow airport between 4 a.m. and 7 a.m. increased significantly. They contended that they found it difficult to sleep after 4 a.m. and impossible after 6 a.m. They submitted that the levels of noise to which they were exposed at night were well in excess of those which were considered, internationally, to be tolerable. They contended that the evidence showed that almost all of them had suffered night noise levels in excess of 80 dB LA max, and in one case as high as 90 dB LA max. They referred to the World

Health Organisation's guideline value for avoiding sleep disturbance at night, of a single noise event of 60 dB LA max, and argued that the Government had no adequate research to support their contention that levels of 80 dB LA max were tolerable.²⁸

Hatton I

The Court distinguished this case from previous aircraft noise applications, emphasising the specific complaints of nighttime aircraft noise and the fact that there had been an increase in such noise since the introduction of the 1993 scheme.²⁹ The Court underlined the positive duty of the State to take reasonable and appropriate measures to secure the applicants' rights under Article 8.1 of the Convention.³¹ The Court further confirmed that in the context of Article 8.1 ECHR regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In that context the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.³¹

Of significance, however, is the fact that the Court underlined that in striking the required balance, States must have regard to the whole range of material considerations, and that in the particularly sensitive field of environmental protection, mere reference to the economic wellbeing of the country is not sufficient to outweigh the rights of others. The Court recalled that in *López Ostra v Spain*,³² and notwithstanding the undoubted economic interest for the national economy of the tanneries concerned, the Court looked in considerable detail at 'whether the national authorities took the measures necessary for protecting the applicant's right to respect for her home and her private and family life ...' According to the Court, States are required to minimise, as far as possible, the interference with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. Moreover, the Court recognised that overall, the level of noise during the quota period (11-30pm to 6 am) increased under the 1993 scheme.³³ The Court concluded that in the absence of any serious attempt to evaluate the extent or impact of the interferences with the applicants' sleep patterns, and generally in the absence of a prior specific and complete study with the aim of finding the least onerous solution as regards human rights, it was not possible to agree that in weighing the interferences against the economic interest of the country – which itself had not been quantified – the government struck the right balance in setting up the 1993 Scheme. Accordingly there had been, by a majority of judges, a violation of Article 8 ECHR.³⁴ The Court awarded the applicants the sum of GBP 4,000 each in respect of non-pecuniary damage, having regard to the accounts given by the applicants of the impact on each of them of the increase in night flights since 1993.³⁵

The Separate Opinion given by Judge Costa is noteworthy. He stated that it seemed to him that the inconvenience was very substantial and, all in all, excessive.

The eight applicants lived very near the runways, and four of them had to move house. In his view, they certainly did not do so merely to satisfy a whim, but because they and their families had been finding it extremely difficult to bear the noise, and, in particular, to sleep. He emphasised that what was at issue here were night flights, with aeroplanes landing or taking off between 4 a.m. and 6 a.m. According to Judge Costa, anyone who has suffered for a long period from noise disturbance such as to disrupt their sleep (or prevent them from getting back to sleep once awake) is well aware that the effects of this on the nerves and on one's physical and mental well-being are extremely unpleasant and even harmful. Furthermore, the applications concerned the period subsequent to 1993 and the government had acknowledged that since 1993 the number of night flights had substantially increased. He was adamant that it had 'to be one thing or the other: either the number of potential victims of night flight noise is limited and the 'beneficiaries' of those flights can compensate them, or it is too high for the level of compensation to be financially viable for the beneficiaries, whereupon night flights need to be reviewed in their entirety.'³⁶ It seemed to Judge Costa that, having regard to the Court's case law on the right to a healthy environment,³⁷ maintaining night flights at that level meant that the applicants had to pay too high a price for an economic well-being, of which the real benefit, moreover, was not apparent from the facts of the case. In his opinion, since the beginning of the 1970s, the world has become increasingly aware of the importance of environmental issues and of their influence on people's lives. He recognised the fact that the European Court of Human Rights case-law has not been alone in developing along those lines, giving the example of Article 37 of the Charter of Fundamental Rights of the European Union of 18 December 2000 as being devoted to the protection of the environment. He 'would find it regrettable if the constructive efforts made by the Court were to suffer a setback.'³⁸

The dilemma lies in the Partially Dissenting Opinion of Judge Greve concerning the ethics of using Article 8 ECHR in such a situation, albeit accepting that the night flights' noise did interfere substantially with the applicants' sleep. Her introductory remarks tip the balance in the opposite direction. In the opinion of Judge Greve, '[i]n relation to the notion of 'home', the essence of the protection under the provision is to secure the inviolability of one's home, that is to safeguard individuals against arbitrary interference with their homes. The Convention being a living instrument, the provision has gradually been interpreted to include also environmental rights. There are limits as to the kind of environmental problems – pollution in the widest sense of the word – which people will have to accept before these problems give rise to a violation of Article 8. These environmental rights are nonetheless of a different character from the core right not to have one's home raided without a warrant.'³⁹ In Judge Greve's opinion, '[i]n modern society, environmental problems are not discreet and only of concern to those who may invoke Article 8, given their proximity to the source of the given problem. The amount and complexity of the factual information needed to strike a fair balance in these respects is more often than not of such a nature that the European Court will be at a marked disadvantage compared to

the national authorities in terms of acquiring the necessary level of understanding for appropriate decision-making. Moreover, environmental rights represent a new generation of human rights. How the balance is to be struck will therefore affect the rights not only of those close enough to the source of the environmental problem to invoke Article 8, but also the rights of those members of the wider public affected by the problem and who must be considered to have a stake in the balancing exercise.’ Thus, essentially, a wide margin of appreciation must apply in such cases, according to Judge Greve.

Hatton II

The United Kingdom (UK) government appealed against the judgment in *Hatton I*, under Article 43 of the Convention,⁴⁰ pursuant to which the European Court of Human Rights sitting as a Grand Chamber gave its judgment.⁴¹ According to the Court, Article 8 ECHR protects the individual’s right to respect for his or her private and family life, home and correspondence. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8.⁴² At the same time, the Court reiterated the fundamentally subsidiary role of the Convention in that the national authorities have direct democratic legitimacy and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight.⁴³ The Court considered that in a case such as the present, involving State decisions affecting environmental issues, there were two aspects to the inquiry which may be carried out by the Court. First, the Court may assess the substantive merits of the government’s decision, to ensure that it is compatible with Article 8. Secondly, it may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual.⁴⁴ Furthermore, in connection with the procedural element of the Court’s review of cases involving environmental issues, the Court is required to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available.⁴⁵

The Court noted that ‘in previous cases in which environmental questions gave rise to violations of the Convention, the violation was predicated on a failure by the national authorities to comply with some aspect of the domestic regime. Thus, in *López Ostra* the waste treatment plant at issue was illegal in that it operated without the necessary licence, and it was eventually closed down. In *Guerra*, too, the violation was founded on an irregular position at the domestic level, as the applicants had been unable to obtain information that the state was under a statutory obligation to provide.’⁴⁶ The Court ruled that it must consider whether the government can be said to have struck a fair balance between the economic interests of the operators and of the Country as a whole and the conflicting interests of the persons affected by noise

disturbances, including the applicants. The Court declared that '[e]nvironmental protection should be taken into consideration by governments in acting within their margin of appreciation and by the court in its review of that margin, but it would not be appropriate for the court to adopt a special approach in this respect by reference to a special status of environmental human rights. In this context the court must revert to the question of the scope of the margin of appreciation available to the state when taking policy decisions of the kind at issue.'⁴⁷ In relation to the substantive aspect, the Court considered that it would be pertinent to apply the wide margin of appreciation, as in *Powell and Rayner*: the 1993 scheme for night flights was a general measure. Significantly, the Court ruled that '[t]he sleep disturbances relied on by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in the case of *Dudgeon* to call for an especially narrow scope for the State's margin of appreciation.'⁴⁸ Of particular note is the fact that the Court considered it reasonable, in determining the impact of a general policy on individuals in a particular area, to take into account the individual's ability to leave the area. According to the Court, where a limited number of people in an area are particularly affected by a general measure, the fact that they can, if they choose, move elsewhere without financial loss must be significant to the overall reasonableness of the general measure.⁴⁹ In the circumstances, the Court did not find that, in substance, the authorities had overstepped that margin by failing to strike a fair balance between the right of the individuals affected by the regulations to respect for their private life and home, and the conflicting interests of others and of the community as a whole.⁵⁰

Procedurally, the Court deemed it relevant that the government had consistently monitored the situation, and that the 1993 Scheme was the latest in a series of restrictions on night flights which stretched back to 1962. Notably, the position concerning research into sleep disturbance and night flights was far from static, and it was the government's policy to announce restrictions on night flights for a maximum of five years at a time, each new scheme taking into account the research and other developments of the previous period. The Court was also of the view that the applicants had access to the government consultations, and it would have been open to them to make any representations they felt appropriate. Had any representations not been taken into account, they could have challenged subsequent decisions, or the scheme itself, in the courts. The Court, thus, did not find that there had been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights.⁵¹ There had accordingly been no violation of Article 8 ECHR.⁵²

The Court did consider, however, that the scope of review by the domestic courts in the present case was not sufficient to comply with Article 13 ECHR.⁵³ Additionally, the applicants had contended that they had no private law rights in relation to excessive night noise, as a consequence of the statutory exclusion of liability in section 76 of the Civil Aviation Act 1982. They submitted that the limits inherent in an application for judicial review meant that it was not an effective remedy in rela-

tion to their rights under Article 8 of the Convention, in breach of Article 13.⁵⁴ It was clear to the Court that the scope of review by the domestic courts was limited to the classic English public law concepts, such as irrationality, unlawfulness and patent unreasonableness, and did not at the time (that is, prior to the entry into force of the Human Rights Act 1998) allow consideration of whether the claimed increase in night flights under the 1993 Scheme represented a justifiable limitation on the right to respect for the private and family lives or homes of those who lived in the vicinity of Heathrow airport. The Grand Chamber thus found a violation of the procedural right to an effective domestic remedy under Article 13 of the Convention.⁵⁵ However, whereas the Chamber hearing *Hatton* I had awarded each of the applicants £4,000 as non-pecuniary damage in respect of the violations of Articles 8 and 13, under Article 41 ECHR, the Grand Chamber in *Hatton* II considered that, having regard to the nature of the violation,⁵⁶ the finding of a violation in itself constituted just satisfaction in respect of any non-pecuniary damage.⁵⁷

Joint Dissenting Opinion

Twelve judges, only, in the Grand Chamber formed the majority ruling that there had not been a violation of Article 8 ECHR. Five judges gave a Joint Dissenting Opinion, reaching their standpoint primarily from their reading of the current stage of development of the pertinent case law. In addition, ‘the close connection between human-rights protection and the urgent need for a decontamination of the environment’ led them ‘to perceive health as the most basic need and as pre-eminent’.⁵⁸ They noted with interest the historical link between environmental protection and personal well being (health), referring to the Declaration of the United Nations Conference on the Human Environment in 1972.⁵⁹ The Charter of Fundamental Rights of the European Union, more specifically Article 37 thereof was quoted as providing an interesting illustration.⁶⁰ The fact that environmental pollution knows no boundaries, as evidenced in the *Kyoto* Protocol,⁶¹ in the view of the dissenting judges, made it an ‘issue *par excellence*’ for international law and ‘*a fortiori* for international jurisdiction’. It was their belief that ‘this concern for environmental protection shares common ground with the general concern for human rights’. They reiterated the point often underlined by the Court that ‘the Convention is a living instrument, to be interpreted in the light of present-day conditions’; and noted the ‘evolutive’ and ‘progressive’ interpretation of the Convention and the gradual extension and raising of the level of protection thereunder. They traced the applications under Article 8 ECHR, ‘in the field of environmental human rights’, pursuant to which the Commission and the Court have increasingly taken the view that Article 8 embraces the right to a healthy environment, namely: *Arrondelle* and *Baggs*⁶² *López Ostra v Spain*,⁶³ and *Guerra v Italy*.⁶⁴ It seemed, to the five dissenting judges, that the Grand Chamber’s judgment, deviated from the developments in the case law, and even took a step backwards, giving precedence to economic considerations over basic health conditions in qualifying the applicants’ sensitivity to noise as that of a small minority of people. In their opinion, a simple comparison of the cases with

the present judgment appeared to show that the Court was turning against the current.⁶⁵

The five dissenting judges noted that the majority tried to distinguish this case from the case of *Dudgeon v. the United Kingdom*,⁶⁶ which dealt with the sexual intimacy aspect of the applicant's private life. They quoted from that case, where it was stated: 'The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8'.⁶⁷ They pointed out that the majority differentiated this case from *Dudgeon* by saying: 'the sleep disturbances relied upon by the applicants did not intrude into an aspect of private life in a manner comparable to that of the criminal measures considered in the case of *Dudgeon* to call for an especially narrow scope for the State's margin of appreciation'.⁶⁸ In the opinion of the five dissenting judges, other aspects of privacy, such as health, may be just as 'intimate' albeit much more vital. They were of the belief that 'health as a state of complete physical, mental and social well-being'⁶⁹ was, in the specific circumstances, a precondition to any meaningful privacy, intimacy etc., and could not be unnaturally separated from it. To maintain otherwise, in their opinion, amounted to a wholly artificial severance of privacy and general wellbeing. They added that of course, each case must be decided on its own merits and by taking into account the totality of its specific circumstances. In this case, however, it was clear to them that the circles of the protection of health and of the safeguarding of privacy did intersect and did overlap.⁷⁰

In addition, they stated explicitly that they did not agree with the majority's reasoning that 'whilst the state is required to give due consideration to the particular interests the respect for which it is obliged to secure by virtue of article 8, it must in principle be left a choice between different ways and means of meeting this obligation, the court's supervisory function being of a subsidiary nature and thus limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance'.⁷¹ The five dissenting judges were firmly of the opinion that 'when it comes to such intimate personal situations as the constant disturbance of sleep at night by aircraft noise there is a positive duty on the State to ensure as far as possible that ordinary people enjoy normal sleeping conditions'.⁷² They thought that the problem of noise, when it seriously disturbs sleep, did interfere with the respect for private and, under specific conditions, family life, as guaranteed by Article 8 ECHR, with the potential to constitute a violation of that Article, depending on its intensity and duration. They referred to the United Nations World Health Organisation (WHO) Guidelines, according to which measurable effects of noise on sleep start at noise levels of about 30 dBLA.⁷³ They then paid heed to the fact that in the case before the Court, almost all the applicants had suffered from night noise events in excess of 80 dBLA and in one case as high as 90 dBLA. The dissenting judges considered it to be 'noteworthy that the judgment in its assessment did not take into account these international standards concerning the effects noise has on sleep, al-

though the relevant data were available in the file.⁷⁴ They also deemed noteworthy the fact that the government's claims in respect of the country's economic well-being were based on reports prepared by the aviation industry. Neither did the government make any serious attempt to assess the impact of aircraft noise on the applicants' sleep.

In the Opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner: 'The fair balance between the rights of the applicants and the interests of the broader community must be maintained. The margin of appreciation of the State is narrowed down because of the fundamental nature of the right to sleep, which may be outweighed only by the real, pressing (if not urgent) needs of the State.' They went on to say that '[i]ncidentally, the court's own subsidiary role, reflected in the use of the 'margin of appreciation', is itself becoming more and more marginal when it comes to such constellations as the relationship between the protection of the right to sleep as an aspect of privacy and health on the one hand and the very general economic interest on the other hand.'⁷⁵

Moreover, in their opinion, the government had not demonstrated how and to what extent the economic situation would in fact deteriorate if a more drastic scheme – aimed at limiting night flights, halving their number or even halting them – were implemented.⁷⁶

What is also significant is their steadfast belief that the applicant's rights could have been treated much more realistically than they were by the majority. 'In other words, the issue could have been circumscribed to the 'small minority's' entitlement to just satisfaction for the real pecuniary and non-pecuniary damage incurred.'⁷⁷ The applicants, in their opinion, ought to have been awarded just satisfaction.

What weight can be attributed to such a well-presented Opinion in favour of upholding a violation of Article 8 ECHR by such a significant quorum of judges on appeal in the Grand Chamber of the European Court of Human Rights?

Criticism of the majority judgment in *Hatton II*

This author ventures to submit that the judgment of the majority in the Grand Chamber on appeal in *Hatton II* is open to criticism in many respects.

Increase in night-time aircraft noise

Had the Grand Chamber, on appeal, in *Hatton II* issued a majority judgment in favour of the applicants, it would not, in this author's opinion, have set a precedent.⁷⁸ Each subsequent case would depend on its facts and specific circumstances. Such a positive judgment would not have opened the floodgates. It would be circumscribed in that it concerned night flights and an increase in nighttime aircraft noise to levels exceeding WHO guidelines. In this sense, the judgment of the Grand Chamber could, thus, be subject to legal scrutiny. The law according to *Powell v Rayner* would still apply in respect of daytime aircraft noise. In the case of *Ashworth and*

Others against the United Kingdom,⁷⁹ heard by the European Court of Human Rights after the *Hatton* Grand Chamber judgment, the Court distinguished *night-time* aircraft noise. The applicants, in *Ashworth*, complained that the noise caused by low flying aircraft including aerobatic activity and helicopters, particularly training and maintenance, from the small, privately owned and operated Denham aerodrome amounted to an interference with their right to respect for their private and family lives, and their homes under Article 8.1 ECHR. Applying ‘the approach to be applied in environmental cases under the Convention’ as set out in *Hatton II*,⁸⁰ it is significant that the Court ruled: ‘It is, however clear that the impact of the flying, which is confined to the daylight hours and is further restricted at weekends, is markedly less serious than that of the night flights which were the subject of the *Hatton* case.’

The margin of appreciation

Further, it is submitted that in assessing whether a fair balance had been reached between the respective interests of the individual, and the economic interests and those of the community at large, a disproportionate weight was accorded to the two latter by the majority in the Grand Chamber. The ECHR is deemed to be a ‘living instrument’, and environmental issues have evolved since the 1950s. There would have been scope for the European Court of Human Rights to recognise this and to accommodate the protection of health and the environment within the civil and political rights existing in the Convention. This was the case in *Hatton 1*, the judgment of which was, however, reversed on appeal. Nevertheless, heed should be paid to the five dissenting judges in the Grand Chamber in *Hatton II*. In dissent, they were of the opinion that there would be a violation of Article 8 ECHR where intrusion into the privacy of individuals is such as to seriously undermine their mental and physical health and well being. Therefore, refusal on the part of the majority to admit a violation of Article 8 ECHR, on the facts in *Hatton II*, could be said to reflect an unwillingness on the part of the Court to become involved in the internal legislative/policy discretion of the independent State. In other words it could be defined as a lack of will on the part of the international Court, and ‘political’ in that sense.⁸¹ Margaret De Merieux suggests ‘that the willingness or otherwise of the Court (now) to act in some sense to enforce ‘environmental human rights’ very much implicates the Court’s willingness or not to accept a ‘judicial control not always restricted to the legality of administrative acts’.’⁸² Her ‘conclusion or thesis is that the provisions of the ECHR do give scope for ‘environmental claims’, despite the fact that the Convention organs have often been reluctant to entertain such claims, as alleged breaches of the rights litigated. This reluctance is due to deference to the national authorities of the defendant state, expressed through the legal device of ‘the margin of appreciation’.’⁸³ The use of the doctrine of the margin of appreciation by the European Court of Human Rights has been criticised as being a ‘way of refusing to face the question of proportionality.’⁸⁴ According to the European Court of Human Rights Deputy Registrar: ‘judicial self restraint should itself be exercised with re-

straint if the universal standards are not to be diluted or sacrificed in favour of national diversity.’⁸⁵

Just satisfaction and proportionality

The fact that the finding of a procedural violation under Article 13 ECHR itself, constituted just satisfaction in respect of non-pecuniary damage suffered by the applicants, when on balance according to the majority there had been no substantive or procedural violation of Article 8 ECHR, also merits criticism in this author’s opinion. Such a decision could be warranted in circumstances in which the application under Article 8 ECHR was manifestly ill founded. This was not the case in *Hatton II*, where nighttime aircraft noise had increased but was deemed by the majority judgment to be justified on balance. The applicants were faced with an unreasonable burden of an increase in nighttime aircraft noise. In the particular circumstances, it is submitted that non-payment of damages in just satisfaction was harsh, disproportionate and unjust. This submission is reinforced by *dicta* of the former Commission of Human Rights in *S v France*⁸⁶: ‘When a State is authorised to restrict the rights or freedoms guaranteed by the convention, the proportionality rule may well require it to ensure that these restrictions do not oblige the person concerned to bear an unreasonable burden.’⁸⁷

It is worth repeating the joint dissenting judgment of five judges in *Hatton II*: ‘the issue could have been circumscribed to the ‘small minority’s’ entitlement to just satisfaction for the real pecuniary and non-pecuniary damage incurred.’⁸⁸ The applicants, in their opinion, ought to have been awarded just satisfaction. It would appear that the common law of nuisance⁸⁹ and compensation under statutory regimes⁹⁰, both interpreted in the light of the Human Rights Act 1998, potentially, could be more flexible than the European Convention on Human Rights in this regard!

The Way Forward After Hatton II

International Law

The International Civil Aviation Organisation (ICAO) has adopted a more stringent noise certification standard which will apply to new aircraft types presented for certification after 1st January 2006. This standard, in Chapter 4, Volume 1 of Annex 16 to the Convention on International Civil Aviation,⁹¹ is 10dB lower than the current standard under Chapter 3. However, the opinion is held that ‘the impact of the standard will be marginal given that all new aircraft comply.’⁹²

The 33rd ICAO Assembly, in Resolution A33-7 and its Appendices, issued a consolidated statement of continuing ICAO policies and practices related to environmental protection,⁹³ in which, *inter alia*, States are urged to refrain from unilateral environmental measures that would be harmful to the development of civil aviation.⁹⁴ Thereunder, ICAO guidelines on noise management are premised on a ‘balanced approach’ to the reduction of aircraft noise, which consists of identifying the noise problem at an airport and then analysing the various measures available to

reduce noise. This ‘balanced approach’ requires four principal elements to be explored with the goal of addressing the noise problem in the most cost-effective way, namely: reduction at source; land-use planning and management;⁹⁵ noise abatement operational procedures and operating restrictions. The process of implementation and decisions between elements of the balanced approach is acknowledged as being for the Contracting States, as is ultimately the responsibility to develop appropriate solutions to the noise problems at individual State’s airports, with due regard to ICAO rules and policies. States are requested to ensure that the application of measures to alleviate noise are consistent with the non-discrimination principle in Article 15 of the Chicago Convention and, also, to take into account the particular economic conditions of developing countries. Furthermore, States are invited to inform of their policies and programmes to alleviate the problem of aircraft noise in international civil aviation. Local noise-related operating restrictions at airports are to form the subject of a report for consideration at a future session of the ICAO Assembly. Significantly, States are encouraged not to apply operating restrictions as a first resort,⁹⁶ and then only in a manner consistent with Appendix E of the Resolution. The Assembly recognises that the noise standards in Annex 16 were not intended to introduce operating restrictions on aircraft, and, specifically, that the newly adopted standard in Chapter 4 is based on the understanding that it is for certification purpose only. ICAO, thus, places no obligation on States to impose operating restrictions on Chapter 3 aircraft.⁹⁷ It is noteworthy that the 33rd ICAO Assembly urges States to ensure, wherever possible, that any operating restrictions are adopted only where they are supported by a prior assessment of anticipated benefits and of possible adverse impacts. In particular, States contemplating introducing operating restrictions at any airport on Chapter 3 compliant aircraft are urged not to do so before fully assessing available measures to address the noise problem at that airport in accordance with the balanced approach. Should such restrictions nevertheless be introduced States are urged, *inter alia*: to limit restrictions to those of a partial nature wherever possible as opposed to complete withdrawal of operations at an airport; to take into account possible consequences for air transport services for which there are no suitable alternatives (for example, long-haul services); to consider the special circumstances of operators from developing countries, in order to avoid undue economic hardship for such operators, by granting exemptions; to introduce such restrictions gradually over time, where possible, in order to take into account the economic impact on operators of the affected aircraft; and to inform ICAO, as well as the other States concerned, of all restrictions imposed.⁹⁸

It would appear that within the notion of the balanced approach greater weight is accorded, at the outset, to the economic plight of developing countries and to the economic performance of the international civil aviation industry.

There is, however, continued pressure for nighttime aircraft noise, because of its unknown long-term health effects, to be monitored and regulated at international level. The World Health Organisation (WHO) held a Technical Meeting on Aircraft

Noise and Health in Bonn in Germany on 29-30 October 2001.⁹⁹ The purpose of the meeting was to prepare recommendations to WHO in order for the Organisation to support best research in the domain of aircraft noise and health during the next three biennia. Nighttime aircraft noise, sleep disturbance and the associated health effects were among the main issues discussed. The meeting concluded, *inter alia*, that the knowledge of the dose effect relationship between aircraft noise and specific health effects exist in some areas (e.g. annoyance) and that special attention should be paid to those health effects for which the strength of evidence of links with aircraft noise is lower and which are nevertheless very severe health impairments (for instance cardiovascular diseases).

Recommendations were made for political commitment, common reporting indicators, and international agreement on night flight regulations, respectively. Considering the importance that could be attributable to aircraft noise on health, experts present at the meeting were of the opinion that this issue should be higher on the political agenda, possibly through a ministerial declaration under the auspices of the International Civil Aviation Organisation. There was considered to be a need to supplement Lden, the unit for reporting global noise exposure, with additional units methods for evaluating or communicating noise exposure and its related health aspects, especially during the night. Significantly, it appeared realistic and desirable, based on health criteria, to initiate a debate leading to the proposal of strict internationally accepted regulations on nighttime commercial flights.

A further World Health Organisation, Technical Meeting on Noise and Health Indicators, was convened on 7-9 April 2003 in Brussels, Belgium.¹⁰⁰ It was held against the background of the fact that the impact of noise on health has been far too long limited to annoyance and sleep disturbance¹⁰¹ and other health effects have been overlooked, with the objective of reaching international agreement on a set of indicators that will best reflect and monitor the health impact of noise. There was recognition of the fact that noise pollution¹⁰² and its abatement are rising up the agenda of both politicians and the public. The conclusion was reached that if new evidence is found on sleep disturbance, WHO together with Member States should undertake the necessary work to validate the use of a 'penalty' factor of 10 dB(A) to be added to night noise when computing global noise exposure.

Thus a positive duty on the State to act - to take positive and restrictive measures to protect against the health effects of nighttime aircraft noise - may become more pronounced in the event of positive results from research into the health effects of aircraft noise at night, in order to maintain WHO standards.

European Law

In European law, a Directive on the establishment of Rules and Procedures with regard to the Introduction of Noise-Related Operating Restrictions at Community Airports,¹⁰³ incorporates the balanced approach to noise management around airports enshrined in ICAO Assembly Resolution A33-7.¹⁰⁴ Having as its legal basis the

Common Transport Policy Article 80 of the European Community Treaty, and guided by the principle of sustainable development, the objectives of the Directive are, *inter alia*, to lay down rules for the Community to facilitate the introduction of operating restrictions in a consistent manner at airport level so as to limit or reduce the number of people significantly affected by the harmful effects of noise; and to provide a framework which safeguards internal market requirements. This Directive introduces a definition of marginally compliant aeroplanes, namely civil subsonic aeroplanes that meet the certification limits laid down in Volume I, Part II, Chapter 3 of Annex 16 to the Convention on International Civil Aviation by a cumulative margin of not more than 5 EPNdb (Effective Perceived Noise in decibels). ‘Operating restrictions’ mean noise related actions that limit or reduce access of civil subsonic jet aeroplanes to an airport. They include operating restrictions aimed at the withdrawal of marginally compliant aircraft from operations at specific airports, as well as operating restrictions of a partial nature affecting the operation of civil subsonic aeroplanes according to time period, for example, a night ban. In addition, the Directive contains rules on the noise assessment, to be taken into account prior to the introduction of noise related operating restrictions, together with notification requirements prior to such adoption. The Commission is required, no later than 28 March 2007, to report to the European Parliament and to the Council on the application of this Directive. The report, accompanied where necessary by proposals for legislative revision, must contain an assessment of the effectiveness of this Directive, in particular the need to revise the definition of marginally compliant aircraft in favour of a more stringent requirement.¹⁰⁵

The Commission has, reportedly, ‘launched a series of studies aimed at assessing the current noise exposure situation at Community airports and the possibilities for a harmonised approach towards establishing noise limits at Community airports including an analysis of their environmental and socio-economic impacts. Another study is addressing the particular issue of the economic benefits of night flights with a view to provide guidance to Member States and airports envisaging the introduction of night flight restrictions. To ensure transparency and wide discussion of these issues, it has been decided to set up a working group on airport noise.’¹⁰⁶

The European Commission acknowledges the fact that air transport is having problems gaining acceptance, particularly from local residents who suffer from the noise generated by airports and that the introduction of measures to reduce noise ... caused by air traffic is a ‘*sine qua non*’ if the industry is to continue to grow. ‘However, such an exercise is difficult since the European Union has little room to manoeuvre: in particular, account must be taken of the international commitments entered into by the Member States within the International Civil Aviation Organisation (ICAO).’¹⁰⁷ The European Commission has asked the Council to authorise negotiations for the accession of the European Community to the International Civil Aviation Organisation (ICAO), which comes within the scope of its competence but in which it currently only plays a minor role as an observer.¹⁰⁸

At the other end of the scale, however, '[i]n the past, the Commission has sometimes rejected requests to take initiatives on a specific environmental problem, arguing that such matters could be better solved at local or regional level; such questions concerned, for instance, ...noise in the vicinity of airports. However, it may well be that some day the ambient noise level in the neighbourhood of airports may become the subject of a Community regulation, as the Commission had already announced in 1992.'¹⁰⁹ European Community law has evolved in the sector of noise pollution generally,¹¹⁰ and, specifically, concerning noise restriction measures at airports.¹¹¹ The European Community has acted under the guise of environmental protection in order to introduce a common framework of rules and restrictions at Community airports, as part of a balanced approach on noise management, which will safeguard internal market requirements by introducing similar operating restrictions at airports with comparable noise problems. Under the Directive on the establishment of Rules and Procedures with regard to the Introduction of Noise-Related Operating Restrictions at Community Airports, it has been mentioned that a noise assessment must be carried out prior to the introduction of partial operation restrictions, for example night restrictions, the adoption of which are then subject to procedural notification requirements.¹¹² European Community law has thus evolved since the Commission's Decision on Access to Karlstad airport,¹¹³ to the extent that night curfews undertaken at the local level are subject to the common framework of procedural requirements to have first undertaken a noise assessment and given prior notification in accordance with European Community law. In essence, inroads into what under the concept of subsidiarity lay to be decided nationally, have been made in European Community law in respect of partial nighttime noise operational restrictions.¹¹⁴

It would be wholly conceivable for the European Community to move towards the adoption of ambient noise health standards for aircraft noise in the form of a daughter Directive under the Environmental Noise Assessment and Management Directive,¹¹⁵ akin to those on ambient air quality standards for specific pollutants¹¹⁶ under the Ambient Air Quality Assessment and Management Framework Directive.¹¹⁷ Procedurally, the aim of the Environmental Noise Assessment Directive, having the Environment Title Article 175(1) EC as its legal basis, is to define a common approach intended to avoid, prevent or reduce on a prioritised basis the harmful effects, including annoyance, due to exposure to environmental noise. To that end, the Directive's objectives are that progressively; exposure to environmental noise will be determined, through noise mapping by methods of assessment common to the Member States; information on environmental noise and its effect will be made available to the public; action plans will be adopted by Member States, based upon the noise-mapping results, to prevent and reduce environmental noise, particularly where exposure levels can induce harmful effects on human health.¹¹⁸ Substantively, however, it is submitted that there is a need for the European Community to adopt common noise standard threshold limits in respect of nighttime aircraft noise

for the protection of the environment/health of humans which will apply in all of the Member States.

Nevertheless, there may be another avenue of redress in European Community law for victims of health-debilitating levels of nighttime aircraft noise. One commentator has expressed the opinion that: '[t]he wide competences of the EU and the existing secondary legislation in this area, in conjunction with the existing provisions of international instruments regarding the rights to private life, to property, and political participation would allow for a substantive elaboration of fundamental principles of human rights regarding environmental protection by the Court of Justice. This has not yet happened, but could happen if sufficiently innovative and resourceful litigation was started within the Member states and was forwarded via preliminary references to Luxembourg.'¹¹⁹

The case of *Mary Carpenter v Secretary of State for the Home Department*, a case which did not concern environmental protection but the freedom to provide services and, more particularly the right of the provider's third country national spouse to reside in the Member State of origin of the provider,¹²⁰ would support such an argument. The European Court of Justice, in that case declared that a European Union Member State 'may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures.'¹²¹ Significantly, the Court read and interpreted the Treaty 'in the light of the fundamental right to respect for family life',¹²² and went on to rule that the decision to deport Mrs Carpenter constituted 'an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ... which is among the fundamental rights which, according to the Court's settled case law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law.'¹²³ According to the Court, and on the facts, the decision to deport Mrs Carpenter did 'not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr Carpenter to respect for his family life, and on the other hand, the maintenance of public order and public safety.'¹²⁴ It, thus, constituted an infringement which was not proportionate to the objective pursued.¹²⁵

The implications of this judgment for an interpretive ruling by the European Court of Justice of the right to respect for home and private life as a General Principle of Union Law¹²⁶, to be applied in an environmental context, are profound. This is especially so in the light of the incorporation of the Charter of Fundamental Rights of the Union in Part II of the Treaty establishing a Constitution for Europe (TCE).¹²⁷ Article II-67, Title II Freedoms, of the Constitution provides that everyone has the right to respect for his or her private and family life, home and communications. This should be read in conjunction with Article II-97, Title IV Solidarity, which provides that a high level of environmental protection and the improvement

of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. There would be scope for the European Court of Justice to give more extensive protection as long as it did not reduce the protection accorded under a comparable provision of the European Convention of Human Rights by the European Court of Human Rights.¹²⁸ There would, thus, be the potential for the European Court of Justice, on a referral for a preliminary ruling from a national court, to accord more extensive protection in an interpretation of Article II-67 TCE, aided by the principle of proportionality¹²⁹, than the finding that there had been no violation of Article 8 ECHR by the majority of the Grand Chamber in *Hatton II*. The existence of Community Directives on noise protection provides the basis for the competence of the European Court of Justice to issue such preliminary rulings.¹³⁰ Moreover, a preliminary ruling of the European Court of Justice under Article 234 of the European Community Treaty¹³¹ is legally binding,¹³² whereas, national courts have only to take into account a judgment of the European Court of Human Rights.¹³³

Furthermore, if it were made a procedural requirement of European law to provide information on the decibel sound levels of aircraft flying at night, with a corresponding duty to assess and provide information concerning research into the health effects of high level night aircraft noise, there would be the potential avenue for a breach of the substantive right under Article 8 ECHR commensurate with the ruling in *Guerra*. According to Margaret De Merieux, *Guerra* ... appear(s) to establish a duty under article 8 to supply information about matters which in impacting on the environment impact on the individual.¹³⁴

National Law

According to Micheal Meacher, Environment Minister 1997 to June 2003: 'Research by the Council for the Protection of Rural England has shown that if airport expansion continues unchecked, more than 600,000 people are likely to be disturbed by noise by 2030'. He is of the opinion that '...noise pollution limits need to be agreed for those airports, supervised by the Environmental Agency, with particular emphasis on restricting, or preferably ending, night flights'.¹³⁵

The Department of Transport has published a White Paper on 'The Future of Air Transport', which sets out a strategic framework for the development of airport capacity in the United Kingdom over the next 30 years.¹³⁶ The government's stated basic aim is to limit and, where possible, reduce the number of people in the United Kingdom significantly affected by aircraft noise, which will require a combination of measures, including: promoting research and development into new low noise engine and airframe technologies;¹³⁷ implementing the regulatory framework agreed by the International Civil Aviation Organisation, the key elements of which have been incorporated into UK law by the Aerodromes (Noise Restrictions) (Rules and Procedures) Regulations 2003 (and which currently apply at ten UK airports); and implementing Directive 2003/49/EC, which requires periodic noise mapping at

many airports from 2007 to identify day and night noise problems and, from 2008, action plans to deal with them.¹³⁸ In addition, consultations were scheduled to start in 2004 on a new night noise regime for Heathrow, Gatwick and Stansted.¹³⁹

The government also intends that new legislation should be introduced, when Parliamentary time allows, to strengthen and clarify noise control powers both at larger commercial airports and at smaller aerodromes. There are two main measures.

First, an amendment to section 78 of the Civil Aviation Act 1982 so that controls such as night restrictions could, subject to public consultation, be set on the basis of noise quotas alone, without a separate movements limit. This would mean that the primary control at an airport regulated by the government could be related more directly to the noise nuisance, providing a more effective incentive for airlines to acquire, use and develop quieter aircraft. The *proviso* is added that this amendment does not signal any intention to make the controls any less stringent than they are currently. Second, from 2007, European Union Member States will be required (by Directive 2002/49/EC) to collate noise maps using a variant of Leq which incorporates weightings on events in the evening and night, the Lden index.¹⁴⁰

It is the government's belief that in addition to controlling and reducing aircraft noise impacts, a proportion of the large economic benefits provided by airport development should be used to mitigate their local impacts.¹⁴¹ With immediate effect, therefore, the government expects the relevant airport operators to: offer households subject to high levels of noise (69dBA Leq or more) assistance with the costs of relocating; and offer acoustic insulation (applied to residential properties) to other noise-sensitive buildings, such as schools and hospitals, exposed to medium to high levels of noise (63dBA Leq or more).¹⁴² In addition, to address the impacts of future airport growth, the government expects the relevant airport operators to: offer to purchase those properties suffering from both a high level of noise (69dBA Leq or more) and a large increase in noise (3dBA Leq or more) (approximately equivalent to a doubling of noise energy); and offer acoustic insulation to any residential property which suffers from both a medium to high level of noise (63dBA Leq or more) and a large increase in noise (3dBA Leq or more). If necessary, the Government would give statutory force to these acoustic insulation arrangements under sections 79-80 of the 1982 Act.¹⁴³

Significantly, the government states that the public health impacts of aviation are a matter which it takes very seriously; that research continues on the effects of noise on human health; that it will take account of existing guidelines from the World Health Organisation; and that it is also supporting research to obtain better evidence on this through the European Commission.¹⁴⁴ The White Paper underlines the fact that aviation is an international industry; that there are few areas, apart from airport development, in which the UK is free to make policy in isolation from other countries. However, it is emphasised that most new aviation legislation now origi-

nates at the European Union level and that further EU legislation for harmonising and strengthening environmental protection measures on noise can be expected.¹⁴⁵

It seems unlikely in the light of the government's rhetoric in its White Paper that night flights will cease in the UK. The government would appear to be responding to the potential protection of the Human Rights Act and to the consequential flexibility of the common law, in its expectation of the airport operators to offer households subject to high levels of noise assistance with the cost of relocating, or to offer to purchase those properties suffering from both a high level of, and an increase in, noise, - in that it could be deemed disproportionate to give effect to the public interest without compensation. Selected aspects of two cases are presented in support of this reasoning.

The case of *Dennis v Ministry of Defence* concerned the effect of noise from Harrier jet fighters from RAF Wittering on the neighbouring Walcot Hall Estate and the allegation that this constituted a nuisance at common law and/or infringed Mr and Mrs Dennis's human rights.¹⁴⁶ Buckley J's judgment should be read in the light of the extreme circumstances of this case and the fact that he regarded 'the nuisance as testing the limits of tolerance.'¹⁴⁷ Relevance should also be attributed to the fact that this case was heard after *Hatton I* and before the appeal in *Hatton II*. Nevertheless, heed should still be paid to the principles underlying the decision in nuisance. According to Buckley J, public interest should be considered and selected individuals should not bear the cost of the public benefit.¹⁴⁸ In his view, 'common fairness demands that where the interests of a minority, let alone an individual, are seriously interfered with because of an overriding public interest, the minority should be compensated.'¹⁴⁹

Furthermore, in *obiter dicta*, and in view of his findings on the extent of the noise interference and the agreed fact that it significantly reduced the market value of the estate, Buckley J was satisfied there was an interference with rights under both Article 1 of the First Protocol¹⁵⁰ and Article 8 ECHR. Referring to the case of *Marcic* [2002],¹⁵¹ he was also of the view that an appropriate assessment of the damages at common law would provide 'just satisfaction' under section 8 of the Human Rights Act so that the claims under the ECHR became somewhat academic. He did, however, give his views briefly. Thus, in *S v. France*¹⁵² the Commission held that although Article 1 did not guarantee the right to continue to enjoy possessions in a pleasant environment, nevertheless: 'Noise nuisance which is particularly severe in both intensity and frequency may seriously affect the value of real property or even render it unsaleable or unusable and thus amount to a partial expropriation.'¹⁵³

Following the implications of *S v. France* with respect, with which he agreed, Buckley J would hold that a fair balance would not be struck in the absence of compensation. He would, thus, award damages under section 8 of the Human Rights Act in respect of Article 1 of the First Protocol and Article 8 ECHR. He would hold, as he believed is implicit in the decision in *S v. France*, that the public interest is greater

than the individual private interests of Mr and Mrs Dennis but it is not proportionate to pursue or give effect to the public interest without compensation for both parties.

The House of Lords reversed the Decision of the Court of Appeal in *Marcic*.¹⁵⁴ One of the issues before the House of Lords was whether the statutory scheme of the Water Industry Act 1991 complied with the ECHR. According to the House of Lords it did.¹⁵⁵ In the words of Lord Nicholls of Birkenhead: 'A fair system of priorities necessarily involves balancing many intangible factors. Whether the system adopted by a sewerage undertaker is fair is a matter inherently more suited for decision by the industry regulator than by a court.'¹⁵⁶ He went on to say, however, that 'the claim based on the 1998 Act raises a broader issue: is the statutory scheme as a whole, of which this enforcement procedure is part, convention-compliant? Stated more specifically and at the risk of over-simplification, is the statutory scheme unreasonable in its impact on Mr Marcic and other householders whose properties are periodically subjected to sewer flooding?'¹⁵⁷ Lord Nicholls then applied the law as stated by the majority of the Grand Chamber of the European Court of Human Rights in *Hatton II*.¹⁵⁸ However, and of significance, is the fact that he added that one aspect of the statutory scheme as presently administered did cause him concern. 'This is the uncertain position regarding payment of compensation to those who suffer flooding while waiting for flood alleviation works to be carried out. A modest statutory compensation scheme exists for flood alleviation works to be carried out. ... There seems to be no statutory provision regarding external sewer flooding.'¹⁵⁹ In particular Lord Nicholls continued by stating: '...in principle, those who enjoy the benefit of effective drainage should bear the cost of paying some compensation to those whose properties are situated lower down in the catchment area, and, in consequence, have to endure intolerable sewer flooding, whether internal or external. As the Court of Appeal noted, the flooding is the consequence of the benefit provided to those making use of the system.'¹⁶⁰ The minority who suffer damage and disturbance as a consequence of the inadequacy of the sewerage system ought not to be required to bear an unreasonable burden. This is a matter the Director and others should reconsider in the light of the facts in the present case.¹⁶¹

Moreover, such financial compensatory payments on the part of the aircraft operators responsible for both a high level of, and an increase in, noise would be in compliance with the polluter pays principle in European Community law, and would constitute an undertaking of a measure of social responsibility for their noise polluting activities.¹⁶²

The government's White Paper could be perceived as taking a step backwards regarding its proposals to amend the law in respect of nighttime noise restrictions to a night quota regime without numerical limits on aircraft operations, arguably to the detriment of victims of night aircraft noise. Operating such a night quota system of regulating nighttime aircraft noise would be 'in accordance with the law' under Article 8 ECHR. Moving the legislative goalposts would make a mockery of respect for human rights acting in conformity with the Convention. Would there be scope, how-

ever, for this alteration to be considered a disproportionate measure on the part of the national authorities, applying the Human Rights Act in the national courts?

National courts 'can give sufficient deference to the sphere in which there may be policy choices for the executive by use of the concept of proportionality. If domestic courts translate the international law concept of the 'margin of appreciation' into domestic law, the judges are likely to fail in their statutory duty, which is to decide for themselves whether a public body's decision constitutes a disproportionate infringement of human rights.'¹⁶³

The national courts need not, thus, be bound in the future by the majority judgment of the Grand Chamber of the European Court of Human Rights in *Hatton II*, and its application in international law of the margin of appreciation. Moreover, the Convention is 'a living instrument' and '... the dynamic potential of the ECHR would be impaired if national authorities felt bound to adopt a static approach to implementing rights, based on the most recent decision of the Court, as international consensus on the content of rights would never move on. National courts interpreting Convention rights under the Human Rights Act 1998 should therefore be free to adopt a more liberal interpretation of Convention rights than the Court.'¹⁶⁴

Conclusions

Actors responsible for international, European and national law and policy have recognised the need to respond to grass root unrest concerning nighttime aircraft noise. However, this author questions the pace of such evolution, and, in particular, the consequential wait for research outcomes and results of monitoring nighttime aircraft noise levels. It should not be possible to go on moving the goal posts to suit government economic policy and the interest of the community if even a minority are exposed to serious interference with their health and amenity of life. The minority will get larger. The extent of the noise could potentially interfere with their right to life, and not only constitute an intrusion of their privacy, to the extent that it would be deemed a disproportionate policy choice on the part of a national authority to allow night flights. There would then be the need, for internal market and global reasons, to legislate for uniformity of restrictions on night flights.

A great deal will depend on the European Commission's Report in 2007; on the procedural monitoring of the situation concerning high levels of nighttime aircraft noise; and on the extent of local participation in national Consultations in order to exhaust local remedies. The scope exists for judicial interpretive protection through the mechanism for referral to the ECJ for preliminary rulings on questions of European law concerning the Charter of Fundamental Rights of the Union as well as on questions of European Community noise law. Of significance will be the potential application of the proportionality principle under the Human Rights Act and the absence of restraint on the part of national judges in assessing whether a fair balance between the respective interests has been achieved in the circumstances of the

case and whether the national schemes/legislation are necessary and justified, or whether a more proportionate response would be to restrict night flights altogether.

Much will depend upon whether the national courts will review substantively the compatibility of the schemes to ameliorate nighttime aircraft noise, either legally in place or voluntarily agreed to be undertaken, with Article 8 ECHR. That is, whether they will weigh the reasonableness of the national measures in the whole equation of the assessment of proportionality. At the very least, should the economic argument weigh heavily in favour of the necessity of night-time flights, it will remain to be assessed whether due consideration has been given to compensating those whose quality and amenity of life is significantly adversely affected, i.e. who bear an unreasonable burden? At most, in the proportionality assessment undertaken by the national courts in accordance with the Human Rights Act 1998, the potential exists for the rights of the individuals victim to levels of night aircraft noise in excess of that deemed permissible by the World Health Organisation, to be accorded greater weight than the economic necessity of the national measures i.e. nighttime flights. Freed from the international shackles of allowing a 'margin of discretion' to the national legislature in a democratic society, national courts will be able to weigh all the issues in the balance, possessing the scope to rule that allowing night flights *per se* constitutes disproportionate action on the part of the national authorities.¹⁶⁵

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Endnotes

1. Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner. Application no. 36022/97, *Hatton and Others v The United Kingdom*, judgment 8 July 2003, the European Court of Human Rights, sitting as a Grand Chamber, para. 1 of the Introduction.
2. Christopher Miller, Case Law Analysis, 'The European Convention on Human Rights: Another Weapon in the Environmentalist's Armoury', Vol. 11 No. 1 (1999) *Journal of Environmental Law*, p. 176. Also at p. 176, '...we should hesitate before further eroding the distinction between maladministration and the deliberate and systematic invasion of privacy by the state to suppress political opposition (which Article 8 was originally conceived to combat).'
3. Department for Transport, White Paper *The Future of Air Transport*, Cm 6046, December 2003, Foreword p. 7. 'Demand is projected to be between two and three times current levels by 2030.' Executive Summary, p. 9.
4. *Ibid.*, para. 3.12.
5. JD Leeson, *Environmental Law*, Pitman, 1995, p. 285. See D Ryland, 'Noise Pollution: Aircraft Noise', Vol. 9-10 (1999) *Comparative Law Review*, MKU Toruń, Poland. p. 177.
6. Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner, Application no. 36022/97, *Hatton and Others v The United Kingdom*, judgment 8 July 2003. The European Court of Human Rights, sitting as a Grand Chamber. Introduction, Para. 1. 'It is true that the original text of the Convention does not yet disclose an awareness of the need for the protection of environmental human rights. (footnote 1, the idiom 'environmental protection' appears in fifty-seven of our cases. The phrase 'environmental human rights' appears for the first time in the majority judgment).'
7. Principle 1. Justine Thornton and Stephen Tromans, 'Human Rights and Environmental Wrongs Incorporating the European Convention on Human Rights: Some Thoughts on the Consequences for UK Environmental Law', Vol. 11 No. 1 (1999) *Journal of Environmental Law*, p. 35.
8. 'Towards the last quarter of the 20th century, the perception arose that the cause of protection of the environment could be promoted by setting it in the framework of human rights, which had by then been firmly established as a matter of international law and practice.' Margaret De Merieux, 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms', Vol. 21 No. 3 (2001) *Oxford Journal of Legal Studies*, p. 521. See D Ryland, 'The Evolution of Environmental Human Rights in Europe, Paper delivered at the Sixth Fulbright Conference, Strengthening Transatlantic Co-operation and Euro-

pean Integration through Educational and Cultural Exchange, July 31 – August 1, 2004, Pamporovo, Bulgaria. Vol. 47 *Managerial Law* 2005.

9. (41/1993/436/515), judgment 9 December 1994.

10. *Ibid.*, para. 51 of the judgment.

11. 116/1996/735/932), 19 February 1998, para. 57 of the judgment.

12. *Ibid.*, para. 60

13. (3/1989/163/219), judgment of 21 February 1990.

14. *Ibid.*, para. 37 of the judgment.

15. *Ibid.*, para. 40. See also Application no. 7889/77, *Arrondelle v United Kingdom*, (Decision on Admissibility), (friendly settlement) and Application no. 9310/81, *Baggs v United Kingdom*, (Decision on Admissibility), (friendly settlement).

16. *Ibid.*, para. 42.

17. *Ibid.*, para. 43.

18. The Noise Abatement Act 1960 exempts aircraft noise from the protection of the common law of nuisance. Section 76(1) of the Civil Aviation Act 1982, further, provides: 'No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable, or the ordinary incidents of such flights, so long as the provisions of any Air Navigation Order ... have been duly complied with ...' *Ibid.*, para. 15. Christopher Miller, submits that [o]ccasionally, the balance of public and private interests is recognised as requiring the restriction of the right to pursue certain civil actions. Civil aviation could not have developed if the noise arising from each and every takeoff and landing could occasion action in nuisance or trespass from any resident living near an airport. *Environmental Rights Critical Perspectives*, Routledge, London and New York, 1998, p. 15.

19. *Ibid.*, para. 44.

20. *Ibid.*, para. 45. Diane Ryland, 'Noise Pollution: Aircraft Noise', *op. cit.* at p. 184.

21. Application no. 36022/97. A judgment given by twelve judges, balanced somewhat by the dissenting judgment of five judges. What weight, therefore, lies in the dissenting dicta?

22. Application no. 36022/97, *Hatton and Others v The United Kingdom*, judgment 2 October 2001.

23. Under the noise quota scheme each aircraft type was assigned a 'quota count' between 0.5 QC (for the quietest) and 16 QC (for the noisiest). Heathrow airport was

then allotted a certain number of quota points, and aircraft movements had to be kept within the permitted points total. The 1993 Scheme defined ‘night as the period between 11 p.m. and 7 a.m. and further defined a ‘night quota period’ from 11.30 p.m. to 6 a.m. seven days a week ... During the night, operators were not permitted to schedule the noisier types of aircraft to take off (8 QC – quota count – or 16 QC) or to land (16 QC). During the night quota period, aircraft movements were restricted by a movements limit and a noise quota, which were set for each season (summer and winter). *Ibid.*, paras. 33, 34 and 35 of the judgment.

24. *Ibid.*, para. 40. A series of noise mitigation and abatement measures is in place at Heathrow airport, in addition to restrictions on night flights. These include the following: aircraft noise certification to reduce noise at source; the compulsory phasing out of older, noisier jet aircraft; noise preferential routes and minimum climb gradients for aircraft taking off; noise abatement approach procedures (continuous descent and low power/low drag procedures); limitation of air transport movements; noise related airport charges; noise insulation grant schemes and compensation for noise nuisance under the Land Compensation Act 1973. Para. 64.

25. *Ibid.*, para. 70. *R v Secretary of State for Transport, ex parte Richmond upon Thames Borough Council and Others* [1994] 1 Weekly Law Reports, p. 74.

26. *Ibid.*, para. 71. *R v Secretary of State for Transport, ex parte Richmond upon Thames Borough Council and Others* [1995] Environmental Law Reports, p. 390.

27. *Ibid.*, para. 72. *R v Secretary of State for Transport, ex parte Richmond LBC* [1996] 1 Weekly Law Reports, p. 1460 On 12 November 1996, the House of Lords dismissed a petition by the local authorities for leave to appeal against the decision of the Court of Appeal. *Ibid.*, para. 73.

28. *Ibid.*, paras. 74 and 76. ‘The most commonly used index for the measurement of noise is the decibel (dB), the most commonly used index to express noise exposure is the ‘A’ weighted sound pressure level dB(A) and the method of averaging the results over time is the equivalent continuous sound pressure level LAeq’. European Commission Green Paper, *Future Noise Policy*, COM (96)540, 4th November 1996, p. 2.

29. *Ibid.* para. 94.

30. *Ibid.*, para. 95. See *Powell and Rayner v the United Kingdom*, judgment of 21 February 1990, and the *Guerra v Italy* judgment of 19 February 1998, *op.cit.*

31. *Ibid.*, para. 96. (*Powell and Rayner v the United Kingdom*, judgment of 21 February 1990).

32. Judgment of 9 Dec. 1994, para. 55, *op. cit.*

33. *Ibid.*, paras. 97 and 98.

34. *Ibid.*, para. 106. The Court held by five votes to two that there had been a violation of Article 8 of the Convention.

35. *Ibid.*, para. 120. Article 41 of the Convention provides: ‘If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party’.

36. *Ibid.*, paras. 4 and 6 of Judge Costa’s Separate Opinion. (Translation).

37. (see, for example, the *López-Ostra v Spain* judgment, or the *Guerra v Italy* judgment, *op. cit.*)

38. *Ibid.*, para 7 of Judge Costa’s Opinion.

39. Partly Dissenting Opinion of Judge Greve, *Introductory remark*, Application no. 36022/97, *Hatton and Others v The United Kingdom*, judgment 2 October 2001.

40. Article 43 ECHR provides:

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.

3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

41. Application no. 36022/97, *Hatton and Others v The United Kingdom*, judgment 8 July 2003.

42. *Ibid.*, para. 96 of the judgment.

43. *Ibid.*, para. 97.

44. *Ibid.*, para. 99.

45. *Ibid.*, para. 104.

46. *Ibid.*, para. 120.

47. *Ibid.*, para. 122.

48. *Ibid.*, paras. 100 and 123. *Dudgeon v. the United Kingdom*, judgment of 22 October 1981. *Dudgeon* concerned ‘a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8 (art.

8-2).’ Para. 52 of the judgment. The Court went on to rule that ‘the commission by others of private homosexual acts, ... cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.’ Para. 60 of the judgment.

49. *Ibid.*, para. 127.

50. *Ibid.*, para. 129.

51. *Ibid.*, paras 128 and 129.

52. *Ibid.*, para. 130.

53. *Ibid.*, para. 142. Article 13 provides: ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’ Article 13 has not been ratified by the United Kingdom in the Human Rights Act 1998.

54. *Ibid.*, paras 131 and 135.

55. *Ibid.*, paras. 141 and 147.

56. ‘In the present case, the violation of Article 13 derived, not from the applicant’s lack of any access to the British courts to challenge the impact on them of the Government’s policy on night flights at Heathrow, but rather from the overly narrow scope of judicial review at the time, which meant that the remedy available under British law was not an ‘effective’ one enabling them to ventilate fully the substance of their complaint under Article 8 of the Convention.’ *Ibid.*, para. 148.

57. *Ibid.*, paras 146-148.

58. Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner.

59. <http://www.enep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503>. See above, note 7.

60. *Ibid.*, para. 1. Article 37 of the Charter provides: ‘A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.’ Article 37 is now renumbered as article II-97 of the Treaty establishing a Constitution for Europe, [2004] OJ C310.

61. Kyoto Protocol to the United Nations Framework Convention on Climate Change, <http://unfccc.int/resource/convkp.html>).

62. See above, note 15.

63. See above, note 9.

64. See above, note 11. Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner, paras 2-4.

65. *Ibid.*, para 5.

66. Judgment of 22 Oct. 1981.

67. *Ibid.*, para. 52.

68. para. 123 of the judgment of the Grand Chamber in *Hatton II*. See note 48, above.

69. WHO definition of Health, <http://www.who.int/about/definition/en/>

70. paras. 9-11 of the Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner.

71. Para. 123 of the Grand Chamber's Judgment. *Ibid.*, para. 12.

72. *Ibid.*

73. Guidelines for Community Noise – Chapter 4, http://www.who.int/environment_information/Noise/Commnoise4.htm The guidelines are based on a combination of values of 30 dBLA and 45 dBLA maximum. Para. 14 of the Joint Dissenting Opinion.

74. *Ibid.*

75. *Ibid.*, para. 17.

76. *Ibid.*, para. 18.

77. *Ibid.*, para. 19.

78 See the Opinion of the dissenting minority in *Hatton II. supra*

79. Decision as to the Admissibility of Application No. 39561/98 by *Michael Ashworth and Others against the United Kingdom*, 20 January 2004.

80. See paras. 96, 97 and 98 of the judgment of the Grand Chamber, *Hatton v. the United Kingdom* [GC] no. 36022/997, judgment of 8 July 2003.

81. See Margaret De Merieux, 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms', *op. cit.* p. 521. 'Whether or not the European Human Rights Court will act as a court in some sense adjudicating on supposed environmental human rights, is a matter of judicial policy and choice on the part of its judges, in the activist mode. This, then, is the issue into which the matter of environmental 'values and concepts' enforced under the Convention resolves itself. Depending on the choice made, the Court could effectively create environmental rights as part of the understanding of the Convention rights originally formulated without reference to the environment.' p. 555.

82. *Ibid.*, p. 521.

83. *Ibid.*, p. 525. ‘One proceeds from the understanding that the Court can concern itself with the environmental element in claims before it only to the extent that these can come within the understanding of the provision litigated, in the absence of any form of environmental right in the Convention. With the exceptions of Lopez-Ostra and Guerra, in cases invoking the substantive rights under Article 8,...the applicant has failed. The dominant feature of the cases and the one premising the failure of the applications is the acquiescence on the part of the convention organs in the actions or views of the national authorities. The principal device for this acquiescence is ‘the margin of appreciation’. *Ibid.*, p. 550.

84. John Wadham, *The Human Rights Act 1998* Third Edition, Blackstone, Oxford University Press, 2003, p. 45.

85. Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’ (1998) 19 *Human Rights Law Journal* 1, quoted in J Wadham, *The Human Rights Act 1998*, *ibid.*, p. 46.

86. Application No. 13728/88 (1990). The application was ruled inadmissible because the French courts had already awarded damages.

87. Quoted in the judgment of Buckley J in *Dennis v Ministry of Defence* [2003] EWHC 793 (QB), para. 61. See below.

88. Para. 19 of the joint dissenting judgment, *op. cit.*

89. *Dennis v Ministry of Defence* [2003] EWHC 793 (QB). See below.

90. *Marcic v. Thames Water Utilities Ltd.* House of Lords [2003] UKHL 66. See below.

91. ‘The Chicago Convention [1944] is the fundamental source which grants regulatory powers to the international community on matters relating to international civil aviation. The convention established the International Civil Aviation Organisation (ICAO). ICAO is mandated by the Convention to adopt and amend from time to time, as may be necessary, *inter alia*, international Standards. (Article 37(b)). Each contracting State has undertaken to collaborate in securing the highest practicable degree of uniformity in the standards of the Organisation.’ Ruwantissa Abeyratne, ‘Aircraft Noise – Legal and Regulatory Issues and Trends’, (2001) *Environmental Policy and Law*, p. 51, at p 53.

92. European Parliament, A5-0053/2002, Report on the proposal for a European Parliament and Council Directive on the Establishment of Rules and Procedures with regard to the Introduction of Noise- Related Operating Restrictions at Community Airports. COM(2001)695. Opinion of the Committee on the Environment, Public Health and Consumer Policy. ‘Only two aircraft that will meet the standards beyond those prescribed in Chapter 3 of Annex 16 to the Chicago Convention will

be in production after the year 2000, namely the Boeing 747-4000 and the Airbus A321'. Ruwantissa Abeyratne, *op. cit.* at p 58.

93. http://www.icao.int/cgi/goto_m.pl?/icao/en/trivia/ass_sess.htm.

94. Appendix A. General. Para. 5.

95. See Appendix F.

96. Appendix C. Policies and programmes based on a 'balanced approach' to aircraft noise management.

97. Appendix E. Local noise-related operating restrictions at airports. See also, Appendix D, Phase-out of subsonic jet aircraft which exceed the noise levels in Volume I of Annex 16, in which the 33rd ICAO Assembly urges States not to introduce measures to phase-out aircraft which comply, through original certification or re-certification, with the noise certification standards in Chapters 3 or 4 of Annex 16, and, also, not to impose any operating restrictions on Chapter 3 compliant aircraft, except as part of the balanced approach to noise management and in accordance with Appendices C and E. Paras. 4 and 5, respectively.

98. *Ibid.*, paras. 1, 2b), 3c)d)e)f)i).

99. For the Report of the Meeting see http://www.euro.who.int/Noise/Activities/20021203_1.

100. For the Meeting Report see http://www.euro.who.int/Noise/Activities/20030123_3

101. It is relevant to note that sleep disturbance is considered to be one of the most serious effects of environmental noise and that more and more Europeans are exposed to noise levels above 55 dB(A). WHO guidelines say that for good sleep, sound levels of about 45 dB Lamax should not appear more than 10-15 times per night. World Health Organisation Regional Office for Europe, 'Noise and Sleep', <http://www.euro.who.int/Noise/Activities/200403041>.

102. Pollution has been defined as:

'the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such nature as to endanger human health, harm living resources and ecosystems, and impair or interface with amenities and other legitimate uses of the environment.' *OECD and the Environment*, Paris, 1979 at 108, quoted in Ruwantissa Abeyratne, 'Aircraft Noise – Legal and Regulatory Issues and Trends', *op. cit.* at pp. 51 – 52.

103. Directive 2002/30/EC, of the European Parliament and of the Council, [2002] OJ L85/40.

104. Comprising four principal elements, namely: reduction of aircraft noise at source; land-use planning and management measures; noise abatement operational procedures; and operating restrictions. *Ibid.*, Articles 2(g) and 4(1).

105. *Ibid.*, Articles 1, 2(d)(e), 4(2), 5(1), 11, 14 and Annex II.

106. European Commission, Report concerning Existing Community Measures relating to Sources of Environmental Noise pursuant to Article 10.1 of Directive 2002/49/EC relating to the Assessment and Management of Environmental Noise, COM(2004)160, 10 March 2004. Para. 3.4. Aircraft Noise, p. 13.

107. European Commission, White Paper 'European Transport Policy for 2010: Time to Decide', COM(2001)370, 12 September 2001, p. 39.

108. In order for the Community to become a member, the Chicago Convention establishing the ICAO will have to be amended. The amendment will have to be approved by two thirds of the organisation's members, which will take several years. European Commission Press Release, 'Strength through unity: the Commission asks for the European Community's accession to the ICAO', IP/02/525, 9 April 2002, <http://www.europa.eu.int/rapid> .

109. COM(92)494, 2 Dec. 1992. 'The question of whether the Community should deal with matters of a purely local nature is something to be answered under the general principle of subsidiarity.' Ludwig Krämer, *EC Environmental Law*, Fifth edition, Sweet and Maxwell, 2003, para. 1-04, p. 3.

110. Directive 2002/49/EC of the European Parliament and of the Council relating to the Assessment and Management of Environmental Noise, [2002] OJ L189/12.

111. Directive 2002/30/EC, of the European Parliament and of the Council on the establishment of Rules and Procedures with regard to the Introduction of Noise-Related Operating Restrictions at Community Airports, [2002] OJ L85.

112. *Ibid.*

113. Commission Decision 98/523/EC on a procedure relating to the application of Council Regulation (EEC) No. 2408/92 (Case VII/AMA/10/97 – Access to Karlstad airport), [1998] OJ L233/25, to the effect that the Decision of the Swedish authorities infringed Directive 92/14/EEC and Regulation (EEC) No. 2408/92 in so far as it restricts, outside the night curfew (22.00 to 07.00 hours), the exercise of traffic rights on air routes between the new Karlstad airport and other airports in the Community with Chapter 2 aircraft. (Para. 40). This Decision gave rise to the comment: 'It is difficult to understand why a night curfew should comply with the principle of necessity and proportionality but a limitation on access to the airports to less noisy aeroplanes does not'. para. 3-23, p. 106. Ludwig Krämer, (2003) *EC Environmental Law*, *op. cit.*

114. Gaining criticism from the European Parliament as follows: 'If an airport wants to ban certain night flights it can only do so if it carries out a new investigation. Such an investigation is subject to a whole range of complicated rules (Article 5 and Annex 2). In other words, if an airport wants to reduce noise nuisance, it is restricted from doing so by complex rules and the need for the European Commission's approval. On the other hand, if the airport does not want to do anything to tackle noise nuisance, it is under no pressure whatsoever to do so.' Report A5-0053/2002, Opinion of the Committee on the Environment, Public Health and Consumer Policy, *op. cit.* See further B5-0305, 0319, 0334 and 0339/2000, European Parliament Resolution on Night Flights and Noise Pollution Near Airports adopted on 14/04/2000. Significantly, the European Parliament '[I]s of the opinion that flight movements, particularly at night, are a source of nuisance to people and that they therefore should be reduced.' Para. 9. *Cf* L Kramer, *op. cit.* '...night flight restrictions .. can only in theory be introduced by each airport, but .. are not introduced – for competition reasons.' Para. 8.46, p. 295.

115. Directive 2002/49/EC of the European Parliament and of the Council relating to the Assessment and Management of Environmental Noise, [2002] OJL 189/12, *op. cit.*

116. Council Directive 1999/30/EC relating to Limit Values for Sulphur Dioxide, Nitrogen Dioxide and Oxides of Nitrogen, Particulate Matter and Lead in Ambient Air, [1999] OJ L163. Directive 2000/69/EC of the European Parliament and of the Council relating to Limit Values for Benzene and Carbon Monoxide in Ambient Air, [2000] OJ L313. (See also Directive 2002/3/EC of the European Parliament and of the Council relating to Ozone in Ambient Air, [2002] OJ L67).

117. Council Directive 96/62/EC, [1996] OJ L296.

118. Directive 2002/49/EC, *op. cit.*, Article 1. 'Environmental Noise' is defined as unwanted or harmful outdoor sound created by human activities, including noise emitted by means of transport, road traffic, rail traffic, air traffic, and from sites of industrial activity, Article 3(a). See also, Commission Recommendation 2003/613/EC concerning the Guidelines on the Revised Interim Computation Methods for Industrial Noise, Aircraft Noise, Road Traffic Noise and Railway Noise, and Related Emission Data, [2003] OJL 212/49.

119. Pavlos Eleftheriadis, 'The Future of Environmental Rights in the European Union', in Philip Alston (ed.), *The EU and Human Rights*, Oxford University Press, 1999, chapter 16, p. 529 at pp. 549 and 547.

120. Case C-60/00, ECR 2002 I 6279.

121. *Ibid.*, para. 40 of the judgment.

122. *Ibid.*, para. 46.

123. *Ibid.*, para. 41.

124. *Ibid.*, para. 43.

125. *Ibid.*, para. 45.

126. There was no mention of human rights in the founding Treaty of Rome in 1957. The European Economic Community was founded primarily on economic policies. There was no basis in the Treaty for a general human rights policy. In order to reinforce the principle of the supremacy of Community law, the European Court of Justice declared that fundamental human rights were enshrined in the general principles of Community law and protected by the Court. Case 29/69 *Stauder v Ulm* [1969] ECR 419. Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

127. CIG 87/1/04, 13 Oct. 2004, signed on 29 October 2004 in Rome, <http://ue.eu.int/igcpdf/en/o4/cg00/cg00087-re01.en04.pdf>. [2004] OJ C310. See Diane Ryland, 'The Charter of Fundamental Rights of the European Union: Pandora's Box or Panacea?' Vol. 5/6 (2003) *Managerial Law*, p. 145 ff.

128. Article 52 (3), now Article II-112.3 TCE, Title VII General Provisions Governing the Interpretation and Application of the Charter. See Koen Lenaerts and Eddy de Smijter, 'A 'Bill of Rights' for the European Union, (2001) *CMLRev.* p. 273, at pp. 292, 293 and 296.

129. *Cf* Article II-112.1 TCE. See Diane Ryland, 'The Charter of Fundamental Rights of the European Union: Questions, Problems and Perspectives', Paper presented at the 5th International Academic Conference, 'State, Economy and Society', Andrzej Frycz Modrzewski Cracow College, Poland, 15th - 17th May 2005., (2005) *State and Society*, AFMCC Press, pp. 113-122.

130. See the preceding chapter in this work written by Professor Antoine Jacobs, entitled, '*The Fences Surrounding the Charter of Fundamental Rights in the New European Constitution.*'

131. Article III-369 TCE.

132. The author is thankful to Professor Jo Carby-Hall for raising this relevant point.

133. Section 2 of the Human Rights Act 1998. 'Section 2 of the Human Rights Act 1998 provides that a court or tribunal determining a question that has arisen under any Act in connection with a Convention right *must* take account of any judgment, decision, declaration, or advisory opinion of the European Court of Human Rights, opinion or decision of the Commission, or decision of the Committee of Ministers, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.' John Wadham, *The Human Rights Act 1998*, *op. cit.* p. 63.

134. 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms', *op. cit.* p. 521, at p. 539. 'Also, rights to information and participation should be vigorously defended.' Pavlos Eleftheriadis, *The Future of Environmental Rights in the European Union*, p. 547, *op. cit.*

135. Financial Times, 10 Nov. 2003, p. 1. 'Over the next thirty years, aircraft noise could seriously affect more than 600,000 people... The prediction is based on an analysis of future flight paths and holding 'stacks' used to regulate aircraft landing, published by the Council for the Protection of Rural England. The CPRE argues that the government's assessment of noise nuisance is inadequate because it is based on research undertaken in towns where noise is already a problem. It also uses an average over a given period, which does not reflect fully the impact of noise peaks and troughs'. Financial Times, 11 June 2003, p. 5.

136. Cm 6046, December 2003.

137. 'An ambitious project to design a silent passenger aircraft has been launched by engineers from Cambridge University and Massachusetts Institute of Technology. Ann Dowling, professor of mechanical engineering at Cambridge and one of the silent aircraft project's leaders, said the aim was for 'a radical change in noise levels so that beyond the perimeter of the airport the noise of aircraft flying would be imperceptible to the public'. The researchers hope to design an aircraft as large and fast as the Boeing 747. British Airways, the Civil Aviation Authority, National Air Traffic Services, Marshall of Cambridge, the regional aerospace company, and Rolls-Royce are all partners in the project.' Financial Times, 11 Nov. 2003, p. 7.

138. *Ibid.*, p. 32 Noise, para. 3.11.

139. *Ibid.*, para. 3.12.

140. *Ibid.*, pp. 34 and 35, para. 3.13.

141. *Ibid.*, para. 3.16. Noise Mitigation and Compensation. 'Under the Land Compensation Act 1973, those affected by future airport development can claim compensation for loss in the value of their property directly attributable to the operation of the development. But this does not apply until twelve months after a new runway is in operation.' *Ibid.*, para. 3.18.

142. *Ibid.*, p. 36, para. 3.21.

143. *Ibid.*, para. 3.24. p. 37, para. 3.25.

144. *Ibid.*, para. 3.32.

145. *Ibid.*, pp. 43 and 44, paras. 4.2 and 4.4.

146. [2003] EWHC 793 (QB).

147 *Ibid.*, para. 85 of the judgment.

148. *Ibid.*, para. 47.

149. *Ibid.*, para. 63.

150. 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

151. [2002] 2 All ER 55. The Court of Appeal upheld the Judge's decision that the invasion of the claimants' property by sewage amounted to an interference with his rights under both Article 1 of the First Protocol and Article 8 ECHR. It also referred to *S v France*. *Ibid.*, para. 60.

152. Application No. 13728/88 (1990)

153. 2003] EWHC 793 (QB), *op. cit.* para. 61.

154. Save as to costs. *Marcic v. Thames Water Utilities Ltd.* House of Lords [2003] UKHL 66. (After the judgment of the Grand Chamber of the European Court of Human Rights in *Hatton II*).

155. The House of Lords held, in this respect: 'The Scheme of the 1991 Act was not unreasonable in its impact on householders whose properties were periodically subject to sewer flooding. A fair balance had to be struck between the interests of the individual and of the community as a whole. The balance struck by the statutory scheme was to impose a general drainage obligation on a sewerage undertaker but to entrust enforcement of that obligation to an independent regulator who had regard to all the different interests involved and whose decisions were subject to judicial review. While, in the instant case, matters had plainly gone awry, and it had not been acceptable that several years after the sewerage undertaker knew of the claimant's serious problems, there had still been in the foreseeable future no prospect of the necessary work being carried out, the malfunctioning of the statutory scheme on that occasion did not cast doubt on its overall fairness as a scheme. Accordingly, the scheme set up by the 1991 Act complied with the convention ... *Hatton v UK* [2003] All ER (D) 122 (Jul) considered.'

156. *Ibid.*, para. 38 of the judgment.

157. *Ibid.*, para 40.

158. *Ibid.*, para 41.

159. *Ibid.*, para.44. 'Where properties are affected by external flooding a free clean up service is provided, but there is no compensation.' Lord Hope of Craighead at para. 86.

160. [2002] 2 All ER 55 at [114].

161. *Marcic v. Thames Water Utilities Ltd.* House of Lords [2003] UKHL 66, para. 45.

162. See European Commission Green Paper, *Promoting a European Framework for Corporate Social Responsibility*, July 2001. Corporate Social Responsibility was the theme of the annual International Colloquium, held at the Faculty of Law, Montesquieu University, Bordeaux IV, under the auspices of the Centre for Comparative Labour Law and Social Security (COMPTRASEC) and the International Labour Organisation, July 2004.

163. John Wadham, *The Human Rights Act 1998*, *op. cit.* p. 46, para. 2.5.2. '[T]he idea of the 'margin of appreciation' is premised on the greater ability of national than international authorities to make judgments about where there is a pressing social need and what is a proportionate response to it in the circumstances which obtain in a particular state. Courts which are national authorities cannot duck the issue in that way, ...' Lord Hope of Craighead in *R v. Director of Public Prosecutions, ex parte Kebilene* [1999] 3 WLR 972, at 993-4. Quoted by David Feldman, *Civil Liberties and Human Rights in England and Wales*, Second Edition, Oxford University Press, 2002, p. 84.

164. David Feldman, *op. cit.* p. 83. See also, John Wadham, *op. cit.* pp. 63 and 64. 'There is, within the possible range of interpretation of article 8, the potential for expanding its scope of protection. The Court has not yet gone so far as to require a state to undertake positive obligations. However, the effect of judgments condemning a failure to act is to require positive action. This approach could require states to take positive measures to maintain or improve environmental quality to meet a standard compatible with respect for the right to private life. Positive measures could extend to laws laying down appropriate environmental quality standards and taking the necessary measures to enforce them, as for example, with the problem of urban air quality and programmes by local authorities with respect to Air Quality Management Areas under Part IV of the Environment Act 1995.' Justine Thornton and Stephen Tromans, 'Human Rights and Environmental Wrongs Incorporating the European Convention on Human Rights: Some Thoughts on the Consequences for UK Environmental Law', Vol. 11 No. 1 (1999) *Journal of Environmental Law*, p. 35, at p. 52.

165. For a countervailing argument, see Christopher Miller, *op. cit.* at p. 22: 'Members of various judiciaries in the United Kingdom may be faced with attempts to use rights arguments to further environmental objectives if and when the Human Rights Act 1998, which incorporates certain rights of the European convention, takes effect. Insofar as past experience may be taken as relevant, environmentalists would be unwise to place too much confidence in this strategy.'